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No. 399

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RICHARD C. PRICE, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
LOCAL UNION NO. 4028

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT, UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL UNION NO. 4028

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Respondent, United Steelworkers of America, AFL-CIO, Local Union No. 4028 (hereafter "the Union"), although believing that the court below reached the correct result, agrees with petitioner that the case presents issues worthy of review by this Court. The Union submits, however, that those issues are not accurately stated in petitioner's "questions presented" (Pet., p. 2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In our view, the questions presented by this case which warrant review by this Court are as follows:

1. Does the proviso to Section 8(b)(1)(A) of the Labor-Management Relations Act of 1947 exempt from the scope of Section 8(b)(1)(A) all suspensions of union membership, regardless of the reason for the suspension?

2. If not, and the validity of suspension depends upon the validity of the reason therefor, does a union violate Section 8(b)(1)(A) by suspending one's membership for filing a petition to decertify the union?

REASONS FOR REDEFINING THE QUESTIONS PRESENTED

The Union both suspended petitioner's membership and fined him for filing a petition with the NLRB to decertify the Union. However, petitioner took an appeal to the Union's International Executive Board, which reversed the imposition of the fine.

Petitioner's charge to the NLRB alleged that both the suspension and the fine violated Section 8(b)(1)(A). The NLRB found, however, that in view of the reversal of the fine it never became operative. That finding was affirmed by the court below (Pet. App., p. 20). Neither the NLRB nor the court below thought that the validity of the fine was an issue in this case, and neither passed upon it (*Ibid*).

Petitioner attempts to make the validity of the fine an issue in this Court. However, in view of the factual findings by the NLRB and the Court below, that issue is not squarely presented in this case. Accordingly, the issues upon which certiorari should be granted should be those relating to the suspension of petitioner's membership, as set forth above in our "Counter-Statement of Questions Presented".[1]

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[1] If the validity of the fine *were* squarely presented, we would agree with petitioner that the issue is worthy of review by this Court. The Union made clear when it imposed the fine that the sole means of enforcement would be continued suspension from membership (Pet. App., p. 20). There would thus be presented an issue much dis-

REASONS FOR GRANTING THE WRIT

Whether expulsion or suspension of membership can ever violate Section 8(b)(1)(A) is a question of great practical importance. In recent years, there has developed a divergence of views on the question, with two conflicting interpretations of the Act obtaining some currency. We agree that certiorari should be granted, so that this conflict can be resolved.

The two conflicting interpretations are reflected in the positions which we and the NLRB ("the Board") have taken in this litigation. Our view, very simply, is that the proviso to Section 8(b)(1)(A) removes *all* expulsions and suspensions, regardless of the reasons therefor, from the ambit of Section 8(b)(1)(A). In the Board's view, however, the proviso to Section 8(b)(1)(A) protects only those expulsions and suspensions imposed for reasons which the Board considers valid or desirable. In this case, the Board exonerated us because it approved of the reason why we suspended petitioner. We believe we were entitled to exoneration because, regardless how laudable our reason, the *means* we used—suspension from membership—is protected by the proviso.

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cussed, but not clearly decided, in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (June 12, 1957): whether a fine enforceable only by expulsion is protected by the proviso to Section 8(b)(1)(A). The opinion of the Court declared that such a fine is protected by the proviso, 388 U.S. at 191-92; the dissenting opinion refrained from deciding the question, 388 U.S. at 203, 214; and Mr. Justice White was of the view that the validity of such a fine would depend upon the validity of the purpose for which it was imposed, 388 U.S. at 198. Inasmuch as fines enforceable by expulsion are one of the most common forms of union discipline, the validity of such fines is a question of great practical importance and the unsettled state of the law on this issue in the wake of the three opinions in *Allis-Chalmers* warrants early resolution by this Court.

While both the literal language of the proviso and its legislative history[2] make perfectly clear that ours is the correct interpretation, the Board has recently persuaded one court of appeals to adopt its view, thus creating a conflict among the circuits which should be resolved by this Court. The Seventh Circuit has squarely held that, as we contend, the proviso saves expulsions regardless of the reason therefor. *American Newspaper Publishers Association* v. *NLRB,* 193 F.2d 782, 800 (7th Cir. 1951), *cert. denied* 344 U.S. 812 (1952):

> "Under [the proviso] Congress left labor organizations free to adopt any rules they desired governing membership in their organization. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as Section 8(b)(1)(A) is concerned. This interpretation has support in the legislative history of the Act . . . It is not within the power of the courts to write into this section of the Act, by interpretation, language which would broaden its scope."[3]

Only a few months ago, however, the Third Circuit, declaring that "the proviso does not enable a union to promulgate any rule it desires and hinge membership upon adherence," held violative of Section 8(b)(1)(A) expulsion for a purpose deemed undesirable by the Board. *Philadelphia Moving Picture Machine Operators' Union* v. *NLRB,* —— F.2d ——, 65 LRRM 3020, 3022 (3rd Cir. August 1, 1967). The court below walked a tightrope between these competing interpretations. It ruled that "the Union's action falls within the literal language of the proviso" (Pet. App. 21). But it also recognized that "the Board has been dis-

[2] See, e.g., legislative history quoted in *Allis-Chalmers, supra* n.1, 388 U.S. at 184-90.

[3] The Seventh Circuit reiterated this view in *Allis-Chalmers* v. *NLRB,* 358 F.2d 656, 658, 659 (7th Cir. 1966); *reversed on other grounds* 388 U.S. 175 (June 12, 1967).

criminating in its application of the proviso" (*Ibid*), and it withheld comment on the propriety of the Board's approach.

We expected that the decision last term in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (June 12, 1967) would put an end to this controversy. As we read the three opinions in *Allis-Chalmers*, eight members of this Court indicated clearly their view that expulsions cannot violate Section 8(b)(1)(A), while only one member adopted the Board's view that validity turns on the purpose of the expulsion.[4] However, it is apparent that our reading of *Allis-*

[4] Both the opinion of the Court, by Mr. Justice Brennan, and the dissenting opinion, by Mr. Justice Black, appear to hold that those kinds of discipline protected by the proviso cannot violate Section 8(b)(1)(A). (While there is some disagreement between the two opinions as to what kinds of discipline fall within the proviso, both opinions assume that expulsion does). Only the concurring opinion of Mr. Justice White adopts the Board's view that the validity of the discipline depends upon the validity of its purpose.

The opinion of the Court states: "[T]he proviso to § 8(b)(1)(A) preserves to the union the power to expel the offending member", 388 U.S. at 183. See also 388 U.S. at 191-92: "At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment."

The dissenting opinion states: "In the present case, the Board distinguished [cases where it has found violations] on the ground that the union rules involved there were 'beyond the competence of the union to enforce' and were 'not the legitimate concern of a union' . . . My Brother WHITE seems to take a similar position in resting his concurrence on the Court's holding that the union rule against crossing a picket line is 'valid'. But neither Congress' aim in § 8(b)(1)(A) of proscribing certain means used to accomplish legitimate ends, nor the Court's view that Congress intended no interference with internal union affairs, would allow the application of the Section to depend on the Board's or this Court's views of whether a particular internal union rule is 'valid' or not." 388 U.S. at 213, n.22.

The contrary view of Mr. Justice White appears at 388 U.S. at 198: "I do not mean to indicate, and I do not read the majority opinion otherwise, that every conceivable internal union rule which impinges upon the § 7 rights of union members is valid and enforceable by expulsion and court action. There may well be some internal union rules which on their face are wholly invalid and unenforceable."

Chalmers is not shared by the Board, which continues to seek enforcement of its orders condemning expulsions,[5] nor by the Third Circuit, which enforced such an order and found *Allis-Chalmers* no barrier.[6]

In view of the recurring nature of this issue, and the importance of clarification so that unions may know the lawful limits of the discipline they may impose, we agree that certiorari should be granted in this case.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted, limited to the issues set forth in the "Counter-Statement of Questions Presented," *supra*.

Respectfully submitted,

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[5] See, e.g. *NLRB* v. *Cannery Workers of the Pacific*, pending as No. 21,680 in the Court of Appeals for the Ninth Circuit.

[6] *Philadelphia Moving Picture Union, supra*, 65 LRRM at 3022.